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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JULLIAN PALMER BLOUIN, Defendant and Appellant.	E045510 (Super.Ct.No. RIF137239) **OPINION**

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks, Judge. Affirmed with directions.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Rhonda Cartwright-Ladendorf and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant stole a lawnmower out of a garage while the homeowner was inside the home. Defendant was convicted of burglary while a person was present in the residence. He was found to have suffered two prior serious felonies and three prior serious or violent felony convictions. Defendant now contends:

1. Insufficient evidence was presented to support that he suffered the prior convictions.

2. Under the unusual circumstances of the instant case, defendant's sentence of 35-years-to-life constituted cruel and/or unusual punishment under the federal and state Constitutions.

3. The trial court abused its discretion by refusing to strike his prior serious and/or violent felony convictions.

I

PROCEDURAL BACKGROUND

Defendant was found guilty in a bifurcated jury trial proceeding of burglary (Pen. Code., § 459).[1] The jury found the allegation that during the commission of the offense, a person was present in the residence within the meaning of section 667.5, subdivision (c)(21). The trial court[2] then found that defendant had suffered two prior serious felony

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant was advised that he had a right to a jury trial on the prior convictions. Defendant conferred with counsel and told the trial court that it would "let [it] decide." Later, the trial court stated that defendant had waived his right to a jury trial on the prior convictions, and there was no objection by counsel.

convictions within the meaning of section 667, subdivision (a): robbery with personal use of a firearm (§§ 211, 12022.5, subd. (a)) in 1991, and robbery and kidnap for ransom (§§ 211, 209) in 1968. These convictions were also found to be prior serious or violent felony convictions (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A)), as was a robbery conviction suffered in 1964.

Defendant was sentenced as a third-strike offender to 25 years to life for the burglary, plus 5 years each on the two prior serious felonies, for a total of 35 years to life.

II

FACTUAL BACKGROUND

On June 17, 2007, Craig Trammell was inside his garage located on Kingsway Court in Moreno Valley. Defendant parked in front of Trammell's house and called for him to come outside. When Trammell came out of the garage, defendant asked him if he wanted to buy a lawnmower that defendant had in the back of his truck. Trammell told him that he did not want to buy the lawnmower, and defendant responded, "I want you to know that I'm not a thief." Defendant told Trammell he was moving out of California.

Defendant inquired if any of Trammell's neighbors wanted to buy a lawnmower, and Trammell told him no. Defendant then parked next to the curb at the house of Trammell's next door neighbor, Kent Simplis. Simplis's garage was open. The garage was connected to the house, and Simplis was home. Trammell observed defendant enter the garage. Defendant then "dash[ed]" out with a lawnmower, which he put in the back

of his truck with the other lawnmower. Simplis had used the lawnmower earlier in the day and had put it back in the garage when he was done.

Defendant drove off. Trammell got into his car and went to look for defendant. Trammell eventually found him after driving around the neighborhood and called the police. The Moreno Valley police eventually arrived and stopped defendant. Trammell identified defendant as the person who took the lawnmower.[3]

Simplis's son informed Simplis that the lawnmower was missing. Trammell called Simplis and told him that the police had stopped defendant with Simplis's lawnmower. Simplis drove to where the police had detained defendant and identified his lawnmower. Simplis had not given defendant permission to take the lawnmower.

Defendant was interviewed after he was arrested. He told a Moreno Valley police officer that he bought Simplis's lawnmower from an unidentified Hispanic male sometime that day for $20. Defendant denied he was ever on Kingsway Court. When defendant was asked what happened to the other lawnmower seen in his truck, he told the officer it was none of his "damn business."

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[3] There was only Simplis's lawnmower in the truck when defendant was stopped; Trammell did not know what happened to the lawnmower that defendant tried to sell him.

III

SUFFICIENCY OF EVIDENCE OF PRIOR CONVICTIONS

Defendant contends that insufficient evidence was presented to prove the prior convictions. He concedes the evidence of the 1991 conviction for robbery with the use of a firearm was sufficient; however, he contends his convictions from 1964 for robbery and 1968 for robbery and kidnap for ransom were not supported by sufficient evidence.

A. *Additional Factual Background*

Defendant was charged with having been convicted of robbery with personal use of a firearm on October 25, 1991; robbery and kidnap for ransom as one offense on October 18, 1968; and robbery on December 14, 1964.

At the bench trial on the prior convictions, the People amended by interlineation that the October 25, 1991, conviction had been suffered on January 11, 1991. Further, the 1968 prior consisted of two counts: robbery and kidnap for ransom. However, they arose out of the same set of facts.

The People called Jennifer Sniff, a forensic technician employed by the Riverside County District Attorney's office. Her duties included fingerprint rolling and comparisons. She rolled defendant's fingerprints. She compared them with the fingerprint card submitted as People's exhibit 13, which the prosecutor indicated was a fingerprint card that related to the 1968 conviction. On cross-examination, Sniff stated she had not matched any other fingerprints.

The People introduced several exhibits that purported to identify defendant as having committed the prior convictions, as will be discussed in further detail, *post.*

The trial court reviewed all of the documents submitted by the People. Defendant objected to People's exhibits 8, 9, and 10, details of which will be further explicated, *post.* Further, defendant argued there were no photographs or fingerprints to match defendant to some of the convictions.

The trial court ruled, "I'm satisfied that he is the person identified in all three of . . . these priors that are alleged. My concern was the date differential, but I think under the circumstances it is sufficient. So I'll find his first and second serious priors true and his first special, second special, and third special, or strike priors, are also true." The exhibits were moved into evidence.

B. *Standard of Review*

In a trial of allegations that a defendant has suffered prior convictions, the prosecution bears the burden of proving the truth of the allegations "'beyond a reasonable doubt.'" (*People v. Jones* (1995) 37 Cal.App.4th 1312, 1315 (*Jones*); see also *In re Yurko* (1974) 10 Cal.3d 857, 862, called into doubt on other grounds in *In re Stewart* (1974) 10 Cal.3d 902.) When the defendant challenges the sufficiency of the evidence on appeal, however, the question is much narrower. We determine only "'". . . whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, [we] must consider the evidence in a light most favorable to the judgment and presume the existence of every

fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the [trial court's conclusion], not whether the evidence proves guilt beyond a reasonable doubt."'" (*Jones,* at p. 1315; see also *People v. Johnson* (1980) 26 Cal.3d 557, 576-578 (*Johnson*).) The evidence must be "'of ponderable legal significance . . . reasonable in nature, credible and of solid value.' [Citation.]" (*Johnson,* at p. 576.)

C. *Analysis*

Defendant concedes that the 1991 prior conviction was supported by substantial evidence. The People introduced the section 969b packet for the 1991 conviction, which included a photograph and bore the name Julian Palmer Blouin.

Defendant complains that the only evidence supporting the 1968 convictions was a document dated 1971 that was not part of the record of the 1968 conviction. There was no fingerprint or photograph to confirm that defendant suffered that conviction.

In support of the 1968 convictions for robbery and kidnap for ransom, the People submitted People's exhibit 9, which was a 969b packet with a certification seal from the Secretary of State of California. It contained a minute order from October 4, 1968, for Los Angeles Superior Court case No. A155417, detailing the conviction of Julian Palmer Blouin for robbery and kidnap for ransom. A cumulative case summary was also provided that showed a conviction in case No. A155417 with the name Julian Palmer Blouin and a date of birth of May 5, 1947. Defendant had earlier affirmed that this was his correct birthdate.

People's exhibit 10 showed an admission to prison of Julian Palmer Blouin on October 18, 1968, in case No. A155417, with a birth date of May 5, 1947, for a conviction of second-degree robbery and kidnap for ransom with a sentence of one year to life.

In People's exhibit 11, a document listed a California Department of Corrections (CDC) number of B34248 for Julian Palmer Blouin, who pled guilty to burglary on June 9, 1971. It included a picture of "J.P. Blouin" with the CDC number B34248. The People stated, "There's a photograph of an African-American male that, if the Court were to look at closely, along with the defendant, would find distinct similarities."

In addition, People's exhibit 13 showed that defendant violated his probation. Although a case number was not listed, it showed that he was on probation for robbery where he received a one-year-to-life sentence. People's exhibit 12 reflects an admission to prison on May 7, 1971, for Julian Palmer Blouin, for a probation violation for a conviction suffered in case No. A155417. On defendant's rap sheet, it showed he was admitted to prison on October 18, 1968, for robbery and kidnapping for ransom. In his probation report, the conviction for robbery and kidnap for ransom are also listed, along with the violation of probation.

There was also a fingerprint card with number B34248 and the name Julian Palmer Blouin received on May 7, 1971. This was the one that Sniff used to compare with defendant's recently rolled fingerprints.

"It has long also been the rule in California, in the absence of countervailing evidence, that *identity of person may be presumed, or inferred, from identity of name*." (*People v. Mendoza* (1986) 183 Cal.App.3d 390, 401; accord, *People v. Mason* (1969) 269 Cal.App.2d 311, 314, abandoned on other grounds in *People v. Bracamonte* (1981) 119 Cal.App.3d 644.)

In *Mason,* the People presented only documentary evidence of the prior convictions and no fingerprint matches. Any photographs were not simultaneous with the convictions. (*People v. Mason*, *supra*, 269 Cal.App.2d at p. 313 & fn. 1.) The *Mason* court upheld the sufficiency of the evidence of the prior convictions, finding, " . . . California cases hold that, in the absence of other and contrary testimony, the identity of names, coupled with proper proof of prior convictions, is sufficient to sustain a finding that defendant was the person involved in the earlier cases. [Citation.]" (*Id.* at p. 314, fn. omitted.)

Evidence that the defendant has the same birth date as that of the defendant contained in a record detailing a prior conviction is relevant to establish the defendant's identity as the individual who suffered the prior conviction. (See *People v. Towers* (2007) 150 Cal.App.4th 1273, 1286.)

Here, defendant's name is certainly unique. On all of the records submitted to the trial court, his full name was essentially the same. Moreover, except for documents on the probation violation with his CDC number B32248, his birthdate is listed as May 5, 1947. Defendant presented no countervailing evidence that he was not the person who

suffered these convictions. In light of the case law cited, we conclude the record contains sufficient evidence to support the trial court's finding that defendant suffered a prior conviction in case No. A155417 for robbery and kidnap for ransom in 1968.

As for the 1964 juvenile conviction, defendant complains that "ancient" documents from the Division of Juvenile Justice (the DJJ)[4] referencing the 1964 conviction and listing on a rap sheet in People's exhibit 6 were insufficient to support the conviction.

The evidence of this prior conviction was People's exhibit 8, the probation report, and defendant's rap sheet. People's exhibit 8 consisted of two pages. The first page was a letter from the DJJ stating that Julian Palmer Blouin had suffered a conviction under Welfare and Institutions Code section 602, robbery, on January 6, 1965. He was discharged from the DJJ in November 1968. Due to the age of the case, all other case information had been destroyed. On the register of actions, the name was listed as Jullian Palmer Blouin aka Julian Palmer Blouin with a date of birth of May 5, 1947. On the rap sheet, it refers to defendant being received at the DJJ on January 19, 1965, and a parole date of March 19, 1966, for a robbery, which matched the register of actions. The probation report included the same information. Defendant presented no countervailing evidence.

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[4] When defendant was incarcerated as a juvenile, the DJJ was known as the California Youth Authority.

Certainly it is a better practice in these cases to match a defendant's fingerprints to the conviction or present a photograph, but such evidence is not necessary. (See *People v. Sarnblad* (1972) 26 Cal.App.3d 801, 806.) Moreover, these records had been destroyed by the DJJ. Based on the match of defendant's name and birthdate, we believe that sufficient evidence supported the finding that defendant suffered a prior robbery conviction in 1964.

Based on the foregoing, we conclude that the People met their burden of proving that defendant suffered all of the alleged prior convictions.

IV

CRUEL AND/OR UNUSUAL PUNISHMENT

Defendant contends that the imposition of a sentence of 35 years to life for stealing a lawnmower from a residence while someone was home constituted cruel and/or unusual punishment under the state and federal Constitutions.

A. *Waiver*

The People contend that defendant forfeited or waived his claim by failing to assert it in the trial court. Several published decisions have found waiver of a criminal defendant's claim of cruel and/or unusual punishment. (E.g., *People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27 (*DeJesus*).) In each case, however, the court went on to address the claim in order to "'forestall a subsequent claim of ineffectiveness of counsel' . . . ." (*DeJesus*, at p. 27.) Moreover, *Kelley* simply cited *DeJesus*, without any substantive discussion of the waiver issue.

However, *DeJesus* is questionable authority for a blanket rule of waiver of cruel and/or unusual punishment claims.

First, the specific question in *DeJesus* was whether the trial court should have considered its discretion under *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), abrogated on other grounds as stated in *People v. Chun* (2009) 45 Cal.4th 1172, 1186, to reduce a conviction of first degree murder based on cruel and unusual punishment. *DeJesus* reasoned that ". . . *Dillon* makes clear that its holding was premised on the unique facts of that case. [Citation.] Since the determination of the applicability of *Dillon* in a particular case is fact specific, the issue must be raised in the trial court." (*DeJesus, supra,* 38 Cal.App.4th at p. 27.) In contrast, where the issue is merely whether a sentence is cruel and/or unusual punishment, there normally are no "fact specific" issues. Rather, "'[w]hether a punishment is cruel or unusual is a question of law for the appellate court . . . .'" (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1390.)

Second, the Supreme Court has stated with respect to sentencing claims, "In essence, claims deemed waived on appeal involve sentences which, though *otherwise permitted by law*, were imposed in a procedurally or factually flawed manner." (*People v. Scott* (1994) 9 Cal.4th 331, 354, italics added.) It is at least arguable that a sentence that constitutes cruel and/or unusual punishment is not one "otherwise permitted by law" but simply imposed in a procedurally or factually flawed manner.

Based on the foregoing and in order to "'forestall a claim of ineffectiveness of counsel,'" we will address the issue. (*DeJesus, supra*, 38 Cal.App.4th at p. 27.)

B. *Analysis*

"A sentence may violate the state constitutional ban on cruel and unusual punishment (Cal. Const., art. I, § 17) if '". . . it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."' [Citation.]" (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 87-88.) "In examining whether a sentence is cruel and unusual under California law, this court: (1) examines the 'nature of the offense and/or the offender, with particular regard to the degree of danger both present to society' [citation]; (2) compares the challenged punishment with punishments prescribed for more serious offenses in the same jurisdiction; and (3) compares the challenged punishment with punishments prescribed for the same offense in other jurisdictions [citation]." (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1337 (*Cline*).)

It is permissible to base the determination of whether punishment is cruel and unusual solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; see, e.g., *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Here, defendant argues that his current offense of taking a lawnmower from an open garage in broad daylight would be considered a petty theft were it not for the "peculiarities" of California law and that the crime was not as "serious" as other truly

violent offenses. Defendant distinguishes his offense from a "hot prowl" burglary inside the home.

As noted by the People, it was merely fortuitous that defendant did not encounter an occupant of the Simplis residence when he took the lawnmower. The fact that defendant committed his crime in such a brazen manner, in broad daylight, showed that he was determined to steal no matter what the circumstances. Moreover, defendant's sentence was not merely calculated on the basis of his current offense, but also on the basis of his recidivist behavior. (*Cline*, *supra*, 60 Cal.App.4th at p. 1338.)

Defendant has numerous convictions. According to his probation report, he had suffered the juvenile conviction for robbery in 1964 and was discharged in 1968. He almost immediately committed the strike offenses of kidnap for ransom and robbery and was committed to prison on January 18, 1968, and released on October 22, 1969. He violated his probation and was incarcerated until October 1972. He then was convicted of forgery offenses and unlawful fighting. He committed a burglary offense that violated his probation. In 1983 and 1986, he was convicted of possession of drug offenses. In 1985, he was convicted of theft. In 1991, he committed the additional strike, robbery with possession of a firearm, and was sentenced to seven years in state prison.

Although from the time defendant was released from prison in 1995 he remained conviction free, his prior record was replete with violent crimes and drug possession. Although defendant did refrain from such activity for a period of time, such time is not significant enough to say that his status as a recidivist offender is any less culpable.

Further, defendant had another case pending with the instant case for assault with a firearm and making criminal threats with the use of a firearm or deadly and dangerous weapon. That case was dismissed for a speedy-trial violation. Although the details of the case are not included in the record, it is clear his recent conviction was not an isolated occurrence, showing an aberrant single incidence of criminality.

Defendant has been unable to conform his conduct to the requirements of the law. A sentence of 35 years to life based on such recidivism and a current offense that carried a potential for violence was not unconstitutional as it was proportional to defendant's personal culpability (see *People v. Stone* (1999) 75 Cal.App.4th 707, 715) and does not "'shock the conscience'" (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1517).

Where the punishment is proportionate to the defendant's personal culpability, there is no requirement that it be proportionate to other similar cases. (*People v. Webb* (1993) 6 Cal.4th 494, 536.) Because intercase proportionality is not required to avoid the infliction of cruel or unusual punishment (*People v. Crittenden* (1994) 9 Cal.4th 83, 156), we address the second and third prongs in *People v. Lynch* (1972) 8 Cal.3d 410 only briefly.

With respect to sentences for other offenses in the same jurisdiction, defendant complains that he must serve a longer term than a person convicted of premeditated murder without the use of a firearm, who receives a maximum sentence of 25 years to life and is eligible for parole in 17 years. He also contends that his sentence is longer than the sentence he would have received had he been convicted of rape, robbery, voluntary

manslaughter, or assault with a machine gun. This argument has been repeatedly rejected: "[P]roportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible. The seriousness of the threat a particular offense poses to society is not solely dependent on whether it involves physical injury. Consequently, the commission of a single act of murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826; accord, *People v. Gray* (1998) 66 Cal.App.4th 973, 993; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1137.) One cannot compare a recidivist offense to a nonrecidivist offense. (*Cline, supra,* 60 Cal.App.4th at p. 1338.)

Defendant cites to *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony II*), to contend his sentence is disproportionate even with other recidivist crimes. The majority in *Carmony II* concluded the defendant's 25-year-to-life sentence under the three strikes law was unconstitutionally disproportionate because the triggering offense was a "completely harmless" failure to update his registration as a sex offender. (*Id*. at p. 1079.) The offense was "harmless" because the defendant had not changed his address or evaded authorities in any way and was otherwise "acting in a responsible manner." In addition, the appellate court concluded the defendant's prior strike offenses were "remote and irrelevant to his current offense." (*Id*. at p. 1087.)

In our view, the facts of *Carmony II* are not analogous to those at issue here. Defendant attempts to minimize his current offense but fails to recognize the potential for

violence in his actions. Although we would agree that defendant's convictions are somewhat remote, his priors were certainly not irrelevant to his current offense. He had prior convictions for robbery and kidnap, all similar to a burglary of a residence while the homeowner was at home.

Finally, with respect to sentences for the same offense in other jurisdictions, "California's scheme is part of a nationwide pattern of statutes calling for severe punishments for recidivist offenders. [Citation.]" (*Cline, supra*, 60 Cal.App.4th at p. 1338.) The fact "[t]hat California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez, supra*, 71 Cal.App.4th at p. 1516.) We cannot conclude defendant's sentence constituted cruel or unusual punishment under the California Constitution.

Defendant further claims his sentence violates the prohibition against cruel and unusual punishment under the federal Constitution. We disagree. The hurdles defendant must surmount to demonstrate cruel and unusual punishment under the federal Constitution are, if anything, higher than under the state Constitution. (See generally *People v. Cooper, supra*, 43 Cal.App.4th at pp. 819-825.) In *Rummel v. Estelle* (1980)

445 U.S. 263 [63 L.Ed.2d 382, 100 S.Ct. 1133], the Supreme Court upheld a sentence under a Texas recidivist statute of life with the possibility of parole for obtaining $120.75 by false pretenses. The defendant's previous offenses consisted of fraudulent use of a credit card to obtain goods and services worth $80 and passing a forged check in the amount of $28.36. (*Id*. at pp. 268-286.) Here, defendant's prior offenses were much more serious and frequently committed than the defendant in *Rummel*. In addition, his current offense presented a potential for violence. Accordingly, his sentence passes muster under the federal Constitution.

Defendant claims at 62 years old, he poses no ongoing threat to society, and the sentence he received is grossly disproportionate to his offense. However, we cannot conclude based on defendant's extensive record and the current offense that his sentence constitutes cruel and/or unusual punishment under the federal or state Constitutions.

V

ROMERO MOTION

Defendant finally contends that the trial court abused its discretion by declining to strike his three prior felony convictions pursuant to *People v. Superior Court* (*Romero*) 13 Cal.4th 497 (*Romero*).

A. *Additional Factual Background*

Defendant brought a written *Romero* motion to strike his prior convictions. The People filed opposition to the motion to dismiss the priors, citing to his lengthy criminal history and the potential for violence in the current offense. As set forth, *ante*, the People

submitted numerous documents supporting the three convictions. The trial court found the prior convictions true.

The trial court then heard the *Romero* motion at the time of sentencing. Defendant's wife, Mildred Huspeth, testified on his behalf. She claimed she knew nothing of defendant's criminal past. She indicated that their small business was failing, even though it had once been very successful, and they owed on their mortgage. Defendant was under a lot of stress and had started drinking again.

Reverend Orville Johnson, defendant's brother-in-law, testified that he had known defendant for 24 years. Defendant had been a good father to Huspeth's children, even though he was only their stepfather. Defendant's business was cabinetmaking, and he was extremely gifted at his craft. Johnson did not believe that defendant would be a danger to society if he were released.

Defendant testified on his own behalf. He had been sober for 18 years but drank on the day that he took the lawnmower. The entire event was a "blur." He stated he was 60 years old and knew this was no way to handle the situation. Defendant apologized for his behavior. He had not been convicted of anything in the previous 18 years. He just wanted his business and his family back. The trial court indicated it had read character reference letters submitted by defendant.

The trial court denied the *Romero* motion finding, "[T]he courts have consistently talked about the spirit of the three strikes law and whether or not an individual fits within that spirit. For purposes of making my ruling, I think it's important to understand the

history here. [¶] [Defendant] started off stealing a car as a juvenile in '64, committed a robbery in '65 as a juvenile, committed a theft in '66 as an adult, committed a robbery in '68 as an adult, and the robbery was for purposes of ransom, apparently -- it was kidnapping for robbery -- excuse me. [¶] In 1970 he was carrying a concealed weapon; 1971, forgery; 1971, burglary; 1983, he was using drugs; 1985, theft; 1986, using drugs; 1991, another robbery, for which he did seven years, and then the current offense. [¶] I cannot in good conscience find that this is the kind of case, the kind of person that was not intended to be covered by the three strikes law. It wasn't an isolated incident in his past. It's a . . . history. [¶] I have to disagree with the good reverend.[5] I think this does indicate a career criminal, somebody who, until the last few years, has consistently committed crimes. For that reason, I will not strike any of his priors."

B. *Analysis*

A trial court's decision to not dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony I*).) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary

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5 The trial court was referring to Reverend Johnson.

determination to impose a particular sentence will not be set aside on review.'" [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377; see also *People v. Myers* (1999) 69 Cal.App.4th 305, 309.)

The California Supreme Court explained, "In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*Carmony I, supra*, 33 Cal.4th at p. 378.) Discretion is also abused when the trial court's decision to strike or not to strike a prior is not in conformity with the "spirit" of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Myers, supra*, 69 Cal.App.4th at p. 310.)

But "[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. [Citation.]" (*People v. Myers, supra,* 69 Cal.App.4th at p. 310.) "Because the circumstances must be 'extraordinary . . . by

which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony I, supra,* 33 Cal.4th at p. 378.)

Here, defendant has not met his burden of showing that the trial court's decision not to strike his prior convictions was irrational or arbitrary. The trial court's determination that a three-strikes sentence was warranted based on defendant being a career criminal, somebody who, until the last few years, had consistently committed crimes, was well within the trial court's discretion.

As set forth, *ante*, we disagree with defendant that the current offense, although technically "serious," was not in fact a dangerous crime. Although defendant claims that the trial court did not consider the current offense in determining whether to strike the prior convictions, the trial court had sat through trial and was keenly aware of the facts involved in current offense.

Further, although there is little information about the prior offenses, defendant was convicted in 1991 of robbery with the use of a firearm. The facts of the 1968 convictions for robbery and kidnap for ransom show that defendant approached a woman and her daughter. He placed a "revolver" in the mother's side and ordered them both to walk over to a nearby car. He then emptied the mother's purse and forced the daughter to walk

away with him for another block. Although the revolver was later determined to be a toy gun, this does not diminish the fear that he placed in his victims. Although defendant characterizes his prior offenses as being nonviolent, they certainly created the potential for violence and were serious.

In addition, although the instant offense was the first defendant had committed in 18 years, since the 1991 robbery, he was in prison and on parole for that offense until 1997. Prior to that, he was almost continuously in custody, on parole, or on probation, as we outlined extensively, *ante*.

Despite the period between 1997 and 2007, defendant spent most of his juvenile and adult life in prison, on probation, or on parole. Given defendant's continuous criminal history, the fact that he was involved in the current offense, which presented a potential for violence, we conclude that the prior convictions were not too remote and that the trial court did not abuse its discretion by refusing to strike them. Defendant was well within the spirit of the three strikes law.

VI

ABSTRACT OF JUDGMENT

Defendant notes in his opening brief that the oral pronouncement of judgment differs from the abstract of judgment and minute order for the date of sentencing.

At sentencing, the trial court stated, "With regards to the sentencing, we've got two 667 (a) priors[.] [¶] . . . [¶] Those are each five years . . . ." The minute order for February 29, 2008, the date of sentencing, and the abstract of judgment both state that he

was sentenced to five years on one section 667, subdivision (a) prior and five years for the "section 667.5, subdivision (c)(21)" allegation. The court's oral pronouncement of sentence prevails over the minutes and abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Clerical errors can be corrected on appeal. (*Ibid*.) We shall therefore direct the trial court to correct the minute order and abstract of judgment.

VII

DISPOSITION

The superior court is directed to correct its minute order from sentencing on February 29, 2008, to reflect that sentence was imposed on two of the section 667, subdivision (a) priors in place of the section 667.5, subdivision (c)(21) allegation. In addition, the trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P.J.

We concur:

GAUT
J.

MILLER
J.